



NEW SOUTH WALES STATE CORONER'S COURT

File Number: 96/2010

Name of Deceased: Isabela Fresco

Hearing Dates: 17-18 August 2011

Location of Inquest: State Coroners Court, Glebe NSW

Date of Finding: 18 August 2011

Coroner: Magistrate P.A. MacMahon
Deputy State Coroner

Representation:

- Sergeant S Korneluk, Coronial Advocate assisting the Coroner
- Ms M Gerace, for Penrith City Council

Note: Certain evidence given during the course of this inquest is subject to a non-publication order pursuant to section 74 (1)(b) of the Coroner's Act 2009.

Non-publication orders made pursuant to Section 74 (1)(b) Coroners Act 2009.

The publication of photographs of Isabela Fresco taken following her death is prohibited.

The publication of the names of the brother and sister of Isabela Fresco is prohibited.

Findings made pursuant to Section 81(1) Coroners Act 2009

Isabela Fresco (born 21 October 2008) died at the Westmead Children's Hospital, Westmead on 11 January 2010. The cause of her death was drowning which occurred when she was able to enter into the swimming pool in the backyard of her home on 10 January 2010 and because of her age, inexperience and lack of swimming ability was unable to escape there from.

Recommendations made pursuant to Section 82 Coroners Act 2009

To: The Minister of State responsible for the administration of the Swimming Pools Act 1992

That the Swimming Pools Act 1992 be amended so as to:

- Require that all swimming pools be registered with the local government authority for the area in which it is situated,
- Require that within a specified period all swimming pools be required to be brought into compliance with Australian Standard AS1926.1 – 2007,
- Require that all owners of property on which swimming pools are constructed be required to provide a certificate of compliance with the provisions of the Swimming Pools Act 1992 to the relevant local government authority on a periodical basis,
- Provide that the right of entry to properties for the purpose of inspection of swimming pools provided to local government officers be extended so as to allow such officers entry in order to determine whether or not a swimming pool exists on a particular property.
- Provide that where inspections of swimming pools are undertaken by officers of a local government authority the authority be entitled to impose a fee for the purpose thereof that allows the Authority to recover the actual and incidental costs of such inspection.

To the Minister of State responsible for the administration of the Conveyancing Act 1919

- That the Conveyancing (Sale of Land) Regulation 2010 be amended so as to require that a certificate of compliance with the provisions of the Swimming Pools Act 1992 be a prescribed document where the property the subject of a contract for the sale of land has erected thereon a swimming pool.

To the Law Society of NSW

- That the Society bring to the attention of members, and others engaged in the purchase and sale of residential properties, the terms of the warning concerning swimming pools required by Clause 15, Schedule 1 of the Conveyancing (Sale of Land) Regulation 2010 and that where a property that is to be purchased has constructed on it a swimming pool the terms of the warning be brought to the specific attention of the purchaser.

Introduction

1. Isabela Fresco (who in these Findings I will call Isabela) was born on 21 October 2008. In January 2010 she resided with her parents, Marcos and Norma Fresco and her older brother and sister at the family home in western Sydney. She, like most children of her age, loved water activities, had been to the local swimming pool but had not had any swimming lessons.
2. On Sunday 10 January 2010 the Fresco family were at home. A friend, Chelou Blasco, visited them.
3. Shortly before 5pm it was noticed that Isabela was not to be seen. A search ensued and she was subsequently located floating face down in the swimming pool. She was removed from the pool and efforts were made to revive her. Ambulance officers were called and she was taken to Nepean Hospital and subsequently Westmead Children's Hospital.
4. Unfortunately the efforts made to assist Isabela were not able to revive her and at 1.17pm pm Monday 11 January 2010 she was declared deceased.

Role and Function of the Coroner

5. The primary function of a coroner is to be found in Section 81(1) of the Coroners Act 2009 (the Act). Where a person is found to be deceased a coroner must, if there is sufficient evidence available to do so, make findings as to the identity of the deceased, the date and place of their death and the cause and manner thereof.
6. A further function of a coroner is to be found in Section 82 of the Act. This section gives a coroner the discretion to make recommendations in respect of any matter that arises out of the circumstances of the death that an inquest is dealing with. Recommendations are discretionary and usually deal with matters of health or public safety.
7. The hope is that the making of such recommendations will assist in the prevention of deaths, such as the one that the inquest is dealing with, occurring in the future. It is not the function of an inquest to attribute blame.

Identity, Date and Place of death:

8. Isabela's identity and the date and place of her death were not matters of controversy. Her mother identified her to Dr Corrine Balit at the Westmead Children's Hospital and Dr Balit declared her to be deceased at the hospital on 11 January 2010.

Cause of Death:

9. Dr Balit provided a report of her findings on Isabela's admission to the Westmead Children's Hospital, the treatment she received and her progress following admission. Dr Balit was of the opinion that the cause of Isabela's death was "global ischaemic injury" secondary to "drowning."
10. Dr Johan Duflou, Director Department of Forensic Medicine Glebe, reviewed the findings and treatment of the hospital staff. Dr Duflou recommended a cause of death of "Drowning." I accept the opinions of Dr Balit and Dr Duflou and am satisfied that the cause of Isabela's death was "drowning".

Manner of Death:

11. The manner of death relates to the circumstances of, or what led to, the death of an individual.
12. As mentioned above on Sunday 10 January 2010 the Fresco family were at home. A little after 5pm the family members were going about their activities and Isabela was being supervised by her parents and playing between a grassed area at the front of the home and an enclosed entertainment area in which Norma Fresco was cooking on a cook top.
13. Isabela's brother (9 years of age) and sister (10 years of age) were enjoying themselves in the pool at the rear of the property.

14. Isabela's brother left the pool first and asked his mother to assist him to have a shower. This she did and then returned to her cooking. Having concluded his shower Isabela's brother played on his Nintendo DS and then went to sleep on the lounge.
15. Isabela's sister then left the pool and she also proceeded to the shower. Having completed her shower she went to play on the computer in her brothers room. Prior to playing on the computer Isabela's sister went to the entertainment area and spoke to her parents. At the time Isabela was in the entertainment area.
16. Some 10 to 15 minutes later Mr Fresco noticed that Isabela was missing. He also noticed that the rear wooden door of the playroom was open and that the rear screen door of the property was not closed properly. He went through to the rear of the property and noticed that the pool gate fence that leads from the playroom was not latched closed. Mr Fresco went through the gate into the pool area and found Isabela floating face down in the pool.
17. Constable Lothian was the officer in charge of the investigation of the death of Isabela. He concluded that it was likely that Isabela had entered the pool area by pulling the pool fence gate open. This was made possible when her sister had not secured the gate correctly when she had left the pool area earlier. The gate was not self-locking. Having reviewed the evidence available I agree with Constable Lothian's conclusion.
18. The death of a child in a backyard swimming pool is always the result of the failure to adequately supervise children who are naturally inquisitive, quick off the mark and, as was the case here, love water. Isabela's death is just another example of the failure to adequately supervise.
19. The failure of supervision is not the end of the story. It is recognised that even where every effort is made to properly supervise children there will be breakdowns in that supervision from time to time. This is why it is important to have an effective fall back protection. In the case of a backyard swimming pool that protection is barrier fencing. Such fencing is required to meet the standards established in the relevant Australian Standard.

The Property:

20. The family home was a three bedroom brick dwelling that was constructed in about 1980. It was located within the local government area of the City of Penrith (the Council).
21. In about 1985 the Council gave approval for the construction of a pool in the rear of the property. In February 1986 the pool, as constructed, was inspected by officers of the Council and was found to be in compliance with the then relevant Australian Standard.
22. Council officers had not inspected the pool, and its surrounding fencing, between February 1986 and January 2010. In 2003 however the Council had attended the property for the purpose of the issuing of a building certificate in accordance with the provisions of the Environmental Planning and Assessment Act 1979. Whilst that certificate was issued it did not deal with the swimming pool as the building certificate does not deal with matters under the Swimming Pools Act 1992 (the Pools Act).
23. The enactment of the Pools Act in 1992 made changes to the safety requirements for backyard swimming pools. Among those changes it was a requirement that child-resistant barriers surround such pools. Section 8 of the Pools Act provided an exemption from such requirement for pools that were constructed or installed prior to 1 August 1990. The pool at the subject property was constructed in 1986 and as such the exemption applied to the pool. This continued so long as *“the means of access to the swimming pool from the building are at all times restricted in accordance with the standards prescribed by the regulations.”* (Section 8(2)).
24. Mr and Mrs Fresco had purchased the home in 2006. At the time of the purchase the evidence was that, to Mr Fresco’s knowledge, there were no inquiries made as to the compliance or otherwise of the pool fencing. It was Mr Fresco’s evidence that at January 2010 he had no knowledge of the Pools Act nor was he aware of the Australian Standard relating to Safety Barriers for Swimming Pools.
25. It was also Mr Fresco’s evidence that the locks on one of the gates that provided access to the pool area had broken some time before January 2010 and he, and his nephew, had

tried to repair the lock with apparently limited success. It did not self-close and it was difficult to ensure that it was locked after it was closed.

26. Police undertook an examination of the pool following Isabela's death. In addition to the issues outlined above concerning the gate it was found that there was access to the pool area through a gap between the pool fence and a building wall that would have allowed access by a child.

27. Having regard to the evidence available to me I am satisfied that as at 10 January 2010 the pool fencing at the property did not comply with the provisions of the Pools Act. The failure of the property to meet the safety standards of the Pools Act was therefore another significant contributing factor to Isabela's death. Put simply if the pool had been effectively fenced the breakdown of supervision would not have had the disastrous consequences that it had for Isabela as she would not have been able to get into the pool area.

Recommendations

28. As previously mentioned the role of the Coroner is to review the circumstances of a death, determine the manner and cause thereof and where appropriate make recommendations that, if implemented, might prevent similar deaths in the future.

29. Isabela's death is just the latest of a large number of similar deaths of young children in backyard swimming pools in New South Wales. Other similar deaths have been investigated by myself and other coroners over recent years and apart from the issue of supervision of young children the other significant factor contributing to the deaths is, as it was in this case, the failure of the safety fencing to act as a protective barrier when supervision of the child failed.

30. Isabela's home was within the City of Penrith. The evidence given at inquest by an officer of the Council was that within the council area there were some 60, 000 rateable properties and that it was estimated one in three of those properties had a backyard swimming pool. The Council however did not know how many pools there were.

31. In addition the Council did not know how many of such pools that existed had been constructed with the appropriate approvals and did not know whether or not the pools within its boundaries met the safety standards required by the Pools Act.

32. The Council's evidence was that it had a compliance program in respect of backyard swimming pools however this was only activated on complaint. It did not have the resources to develop a systematic program of identification of pools and the inspection of the pools for compliance with the provisions of the Pools Act.

33. Mr Fresco gave evidence at the inquest. He was of course devastated by the circumstances of his daughter's death. I formed the impression that he was a relatively uncomplicated man. I accept his evidence that until January 2010 he knew little about the fencing and other safety requirements of the Pools Act.

34. The difficulty is that if one in three of properties in the City of Penrith have backyard swimming pools there are no doubt many more pool owners like Mr Fresco in Penrith, and across New South Wales, and it is also likely that there are many more backyard swimming pools that are death traps for young children.

35. The experience of police and coroners is that it is not good enough to simply say that it is the pool owner's responsibility to ensure that the safety fencing surrounding a pool is compliant with the Pools Act. Something more needs to be put in place to ensure that this occurs.

36. The Council also recognised that this is the case and is to be commended for its actions in bringing attention to the issue. The evidence at the inquest, which I accept, shows that it has engaged in media activities to publicise the dangers associated with backyard pools and written to all pool builders, solicitors and other relevant bodies in order to highlight these dangers.

37. In 2009 the Department of Local Government conducted a review of the Pools Act. In April of that year that Department issued an Options Paper that discussed possible

changes to the Pools Act. The Council made submissions to the Department during the review and following the issue of the Options Paper. The Pools Act was subsequently amended.

38. Following the amendments to the Pools Act the Council considered the effect of those amendments in the light of its experiences as a local government area that has a large number of backyard swimming pools and a large population of children.

39. On 9 August 2010 the Councillors resolved as follows:

“That the Local Government Association call on the State Government to institute legislative amendments aimed at implementing mandatory swimming pool fencing inspections and related cost recovery based on inspection fees for Councils.”

40. The note from the Council supporting the resolution was also instructive. It said in part:

“The state Government in November 2009 enacted a number of amendments to the Swimming Pool Act (including a set of Australian Standards for pool fencing AS1926.1 (2007). Whilst these changes went some way to improving swimming pool safety generally, a regime for mandatory pool fencing inspections was not included. It is understood that the State Government considers mandatory pool registration and inspection program was not warranted due to the cost that this would impose on pool owners.

It is difficult to contemplate circumstances where a non-complying pool safety barrier would not constitute a risk to the safety of a person. Sadly, backyard drownings continue to occur.

Whilst educating pool owners still plays a vital role in pool safety, there remains the risk that not all pool owners are aware of their responsibilities and safety issues when they emerge. A mandatory pool-fencing regime would ensure this circumstance is overcome.

It would be important for any mandatory swimming pool safety inspection process to be underpinned by a cost recovery based inspection fee for Councils. Further investigation should also be pursued in relation to the opportunity for pool fencing inspections to be undertaken by other accredited certifiers.”

I fully endorse the views of the Council.

41. No sensible person in the twenty first century would suggest that motor vehicles, which have the capability of causing death or serious injury if not properly maintained, should not be required to undergo regular safety inspection *“because of the cost that this would impose on the owner.”* It is equally specious to make the same suggestion of backyard

swimming pools that have a similar capacity to cause death or injury particularly to vulnerable children.

42. I propose to make a recommendation, as I have previously done, that the Minister reconsiders this matter with a view to implementing a system of registration and inspection as requested by the Council.

Contracts for Sale of Land:

43. Where a person enters into a contract for the purchase of land the Conveyancing (Sale of Land) Regulation 2010 requires that a number of prescribed documents be attached to such contract. Those documents are set out in Schedule 1 to the Regulation.

44. The Regulation also requires that a number of notices form part of, or be attached to, the contract. One such notice is in the following terms:

“Warning – Swimming Pools

An owner of a property on which a swimming pool is situated must ensure that the pool complies with the requirements of the Swimming Pools Act 1992. Penalties apply. Before purchasing a property on which a swimming pool is situated, a purchaser is strongly advised to ensure that the swimming pool complies with the requirements of the Act.”

45. It was certainly the case that following Mr Fresco’s purchase of the property in 2006 he had little or no understanding of the importance of the safety provisions of the Pools Act. I suspect that when he purchased the property the issue of the compliance of the swimming pool was not a matter that was the subject of discussion. I propose to make recommendations to both the relevant Minister and the Law Society of NSW concerning this matter.

46. The recommendation to the Minister will be that the regulation be amended so that the requirement for the current warning should be removed and that a certificate of compliance in respect of the swimming pool and the surrounding safety fencing should become one of the prescribed documents that must be attached to a contract for the sale of land.

47. The recommendation to the Law Society will be that until the regulation is amended solicitors, and others engaged in the purchase and sale of land, should be reminded of the need to bring the above warning to the attention of prospective purchasers.

Magistrate P A Mac Mahon

Deputy State Coroner

18 August 2011